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Black's Railroad Transit Service, Inc. and Candice L. Bowles. Case 33-CA-13903

July 21, 2004

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 30, 2004, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Black's Railroad Transit Service, Inc., Galesburg, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly.

"(a) Discharging or otherwise discriminating against any employee for supporting Teamsters, Chauffeurs & Helpers, Local Union No. 627, International Brotherhood of Teamsters, or any other union."

2. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

However, Member Schaumber finds it unnecessary to pass on the judge's finding and conclusion pertaining to the 8(a)(4) allegation. He agrees that Bowles was unlawfully discharged in violation of Sec. 8(a)(3) and (1).

² We shall modify the judge's recommended Order to conform to his findings. In addition, we shall modify the recommended Order in accordance with our decision in *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001).

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 21, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters, Chauffeurs & Helpers, Local Union No. 627, International Brotherhood of Teamsters, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for cooperating with an investigation by the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Candice L. Bowles full reinstatement to her former job or, if that job no longer exists, to a substan-

tially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Candice L. Bowles whole for any loss of earnings and other benefits resulting from the unlawful discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Candice L. Bowles, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that such action will not be used against her in any way.

BLACK'S RAILROAD TRANSIT SERVICE, INC.

Deborah A. Fisher, Esq., for the General Counsel.

Roma B. Larson, Esq. (Scott & Scott, PC), of Springfield, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Peoria, Illinois, on December 3, 2003. The charge was filed January 31, 2002,¹ and the complaint was issued March 28. The complaint alleges that the Respondent, Black's Railroad Transit Service, Inc., violated Section 8(a)(4), (3), and (1) of the National Labor Relations Act (the Act) by terminating Candice L. Bowles (Bowles) on or about January 23 because she joined Teamsters, Chauffeurs & Helpers, Local Union No. 627, International Brotherhood of Teamsters (the Union), engaged in concerted activities, filed unfair labor practice charges with the National Labor Relations Board (the Board), and participated in Board investigations and proceedings. In lieu of an answer to the complaint, the Respondent's president, Richard Black, responded with a letter, dated April 10, explaining that he decided to terminate Bowles on January 23 because (1) she engaged in personal activities while on duty, (2) had scissors, which were unsafe, in her work van, and (3) stored bulky plastic bags, which interfered with her ability to perform her job, in the van.² The Respondent served a formal answer denying the allegations on September 19, 2003.

At the hearing, the parties were afforded a full opportunity to call and examine witnesses, present oral and written evidence, argue orally on the record and file posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ Unless otherwise indicated, all dates refer to 2002.

² On April 30, 2003, the Board issued a Decision and Order holding Respondent in default for failing to file an answer. On May 22, 2003, the General Counsel filed a motion to correct the record and for reconsideration on the ground that Richard Black's April 10, 2002 letter constituted a timely response to the complaint. On July 10, 2003, the Board issued a Supplemental Decision and Order vacating and remanding this matter for hearing.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation with an office and place of business in Galesburg, Illinois, has been engaged in business as a transportation service. During the 12-month period ending December 31, the Respondent performed services in excess of \$50,000 in states outside of Illinois, and purchased and received at its Galesburg facility goods valued in excess of \$50,000 directly from points outside of Illinois. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

For the past 10 years, the Respondent has had a contract with the Burlington Northern Sante Fe Railroad (railroad) for the transportation of railroad personnel between three locations at the Galesburg, Illinois railroad yard (Galesburg Yard)—the trimmer building, hump tower, and diesel pit. In its operations there, the Respondent utilizes 25 employees, including drivers. The drivers operate five to eight vans, in three 8-hour shifts, 7 days a week. The basic responsibility of a driver is to sit in the van and wait for a railroad employee to get in the van or for the railroad's dispatcher to direct them to a certain location for a pickup. The drivers usually have a significant amount of "downtime" between pickups. For a small portion of that time, drivers are required to dust their vans and clean the windows. During their remaining downtime, drivers engage in assorted activities. Some read, eat lunch, or engage in other activity in their van, while others stand outside their van and converse with other drivers.

Richard Black is the Respondent's owner and president.³ The Galesburg Yard is one of 20-25 terminals served by his company. He visits the Galesburg Yard once or twice a month. Glenda Black, his sister, is employed there by the Respondent as a driver. Since the late 1990's, she has also served as a supervisor. Bowles, the alleged discriminatee, was employed by the Respondent as a driver at the Galesburg Yard from 1992 until 2002. This case revolves around Bowles' activities during her downtime. On average, she had 3 to 4 hours of downtime per shift. Approximately 20-30 minutes of that time was spent cleaning her van. Two or three times per week, Bowles spent her remaining downtime doing needlework in her van. Bowles kept quilting materials in plastic bags and scissors, which were used to cut the material into smaller pieces, in the van's glove compartment.

Glenda Black was aware that Bowles' quilted and knitted in her van during the 10 years that she worked for the Respondent. In fact, she was in Bowles' van on 50 to 70 occasions while she quilted or cross-stitched, and complimented Bowles on the

³ He was not a credible witness. During the early part of his testimony, he was evasive in refusing to even acknowledge the title to a supplement to the drivers' handbook. Tr. 22.

quality of her crafts. However, neither Glenda Black nor Richard Black ever told Bowles that she could not do quilting during downtime.⁴ Other drivers who stitched during downtime were Diana Aaronson and Sally Byrd. However, unlike Bowles, who quilted or cross-stitched in her van, Aaronson would cross-stitch at the trimmer building and Byrd would cross-stitch at the diesel building.⁵

Several years earlier, the Respondent removed first aid kits from its vans after the railroad informed it that the scissors in the kits were dangerous to the occupants of the vehicle in event of an accident.⁶ However, Bowles and other employees were unaware that scissors should not have been in the van. Bowles used scissors, which were approximately 4 inches in length, to cut quilting material.⁷ The scissors were normally kept in the open glove compartment and would have been within the plain view of Glenda Black on those occasions when she saw Bowles knitting. However, Glenda Black never told Bowles that she should not quilt or have scissors in the van. Moreover, prior to January 24, the Respondent never disciplined an employee for quilting, stitching, or having personal items in the vans.⁸

B. The Union Campaign

Bowles was instrumental in the campaign to get union representation for the drivers.⁹ In October 1998, she signed a union-authorization card and distributed cards to the other drivers. On October 23, 1998, the Union filed a petition in Case 33-RC-4339 for certification as the representative of the Respondent's van drivers at the Galesburg Yard. A preelection hearing in Case 33-RC-4339 was held on November 17 and 19, 1998. Bowles testified pursuant to subpoena by the Union on Novem-

ber 19, 1998. A mail ballot election in Case 33-RC-4339 was conducted from January 8 through 21, 1999. Bowles was the only driver to attend the ballot count on February 26, 1999. On April 20, 1999, she testified, again pursuant to subpoena by the Union, at a hearing on objections that had been filed by the Respondent. The Board certified the Union on September 21, 1999.¹⁰ However, on October 4, 2001, the Union disclaimed its right to act as the exclusive bargaining representative for the Respondent's drivers.

After the election and before the Union disclaimed interest in representing the Respondent's drivers, Bowles continued to attend union meetings. Glenda Black attended two of those meetings. In addition, Bowles handed out fliers to the drivers publicizing union meetings held on August 1 and August 20, 2001.¹¹ This activity did not escape the attention of the Respondent. Glenda Black reported to Richard Black that Bowles was passing out fliers about the August 20, 2001 union meeting and intended to become a union representative.¹² Furthermore, in an affidavit, sworn to on November 6, 2000, and submitted to the Board in connection with the disputed election, Richard Black opined that Bowles caused unrest among the drivers and that it was dangerous to have her in a group situation.¹³

Bowles' disciplinary history during the period of her activity on behalf of the Union has been the subject of several Board cases. On August 9, 1999, Bowles filed a charge in Case 33-CA-3101 alleging discrimination by the Respondent in her rate of pay, shift assignments, and the loss of opportunity for extra work and weekend days off. On August 23, 1999, the Union filed a charge in Case 33-CA-12960, in which it named Bowles as a discriminatee. In that case, she alleged that the Respondent, on or about November 1, 1998, discriminated against her "by cutting her wages, reassigning her, and changing her work schedule because of her union activities." On November 9, 1999, a consolidated complaint issued in Cases 33-CA-12960 and 33-CA-13101 alleging that Bowles was an 8(a)(3) discriminatee. On June 1, 2000, after issuance of the consolidated complaint in Cases 33-CA-12960 and 33-CA-13101, Bowles attended a settlement conference at the Board's Regional Office. Richard Black and Glenda Black were also present. The conference resulted in a settlement agreement, but not before Richard Black commented that "if it wasn't for Candy we wouldn't be here."¹⁴ The settlement provided for

⁴ There was no dispute between Bowles and Glenda Black as to the latter's awareness of Bowles' quilting activities during her downtime. Tr. 100, 160-164.

⁵ Lila Magnison, a driver employed by Respondent from 1997 to 2001, recalled seeing Aaronson cross-stitching in her van during downtime. Tr. 130-131. However, there was no evidence that either Richard or Glenda Black ever saw her knitting in the van.

⁶ I did not credit Richard Black's testimony that he told drivers at employee meetings that they were not to have scissors in the vans. He did not keep minutes, nor provide the dates, of the meetings. Tr. 218. Bowles recalled that first aid kits were removed from the vans, but was unaware that they contained scissors or that there was a rule against having scissors in the vans. Tr. 90. In addition, two other credible witnesses, Magnison and Richard Carroll, a driver for Respondent from 1997 to 2000, were not aware of such a rule. Tr. 132, 136-141.

⁷ Glenda Black identified a photocopy of 4-inch scissors as a fair and accurate depiction of the scissors that she observed in Bowles' van. Tr. 172-173; GC Exh. 25. Peters, another driver who allegedly observed them on January 22, initially testified that the scissors were one foot long. His testimony was inconsistent in several respects and he was not a credible witness. In this instance, when confronted with the photograph, he changed his testimony and concurred with Glenda Black's estimate. Tr. 195-196.

⁸ Richard Black conceded that no one else at the Galesburg Yard has ever been disciplined or terminated for having personal items in the vans. Tr. 41-43.

⁹ The history of the union campaign, and Bowles' involvement in it, were based entirely on her testimony and records from prior Board proceedings. This aspect of Bowles' testimony went unchallenged by the Respondent.

¹⁰ Tr. 54; GC Exh. 3.

¹¹ Tr. 55-56; GC Exhs. 21-23.

¹² In yet another display of evasive and inconsistent testimony, Richard Black initially denied being told by Glenda Black that Bowles was handing out fliers for the union meeting and was interested in becoming a union representative. However, he admitted being told about such activity after being shown a copy of, and taking a long pause to ponder, a report given to him by Glenda Black in August 2001. Tr. 27-29; GC Exh. 27.

¹³ Richard Black initially denied having such an opinion, but conceded the point after being confronted with the affidavit. Tr. 33-35.

¹⁴ Although settlement discussions are normally inadmissible to provide liability for the matter being settled, Fed. R. Evid. 408 does not preclude admissibility in a subsequent case of alleged threats made during such discussions. See *Miami Systems Corp.*, 1320 NLRB 71 fn. 2 (1995), mod. but affd. on point, 111 F.3d 1284, 1293-1294 (6th Cir. 1997).

Bowles to receive \$832 in backpay, including interest, and the posting of a notice by the Respondent at the Galesburg Yard. The notice stated, in pertinent part, that it would “make Candy Bowles whole for any losses she suffered as a result of our cutting her wages, reassigning her, and changing her work schedule because of her union activities, sympathies and desires. In lieu of reassignment to the position she held on November 1, 1998, Candy will be assigned to 5 8-hour days per week on the first shift (6:00 a.m.–2:00 p.m.) keeping her current days off (Friday and Saturday).”¹⁵

On March 27, 2000, Bowles filed a charge in Case 33–CA–13289 alleging continued harassment by the Respondent. Specifically, Bowles charged that, on March 22, 2000, she “received a threatening letter to terminate me because I needed daily sheets, log books or if I have a flat tire—to do my job, it sometimes requires the assistance of another driver.” However, after investigating the charge, the Regional Director of Region 33 did not find sufficient evidence to prove an unfair labor violation and, on July 12, 2000, declined to issue a complaint. On September 5, 2000, Bowles refiled her claim for continued harassment by the Respondent in Case 33–CA–13424. However, Bowles withdrew that charge on October 10, 2000.¹⁶

On September 5, 2000, Bowles filed a charge in Case 33–CA–13425 alleging harassment and the imposition of a 7-day suspension in August 2000, for engaging in concerted activity. On November 17, 2000, she amended the charge to assert that she had been reassigned on September 4, 2000, from a van stationed at the tower to one stationed at the trimmer in order to isolate her from other drivers. A complaint, alleging violations of Section 8(a)(3) and (1) of the Act, was issued November 30, 2000. Bowles’ case was consolidated with Case 33–CA–13481, filed June 20, 2001, in which coemployee Richard Carroll asserted that he was terminated by the Respondent because he also engaged in concerted activity. On June 20, 2001, the Board issued a Decision and Order in Cases 33–CA–13425 and 33–CA–13481. The Board, on summary judgment, found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Bowles on August 27, 2000, and reassigning her from her station at the tower to the station at the trimmer on September 4, 2000, as well as terminating Richard Carroll on October 23, 2000. The Board ordered the Respondent to remedy its unfair labor practices. *Black’s Railroad Transit Service*, 334 NLRB 325 (2001). The Board’s Order was enforced by an Order of the Seventh Circuit Court of Appeals, dated March 7, 2002. *National Labor Relations Board v. Black’s Railroad Transit Service*, Case No. 01-3325 (7th Cir. 2002). Thereafter, on May 17, 2002, Richard Black signed a notice to employees in which he stated, in pertinent part, that he would make Bowles whole for any loss or earnings and other benefits suffered as a result of her unlawful suspension and reassignment, and would offer her reassignment to her former location.¹⁷

On December 7, 2001, shortly after submitting his November 6, 2000 affidavit to the Board, Richard Black issued a letter

to Bowles informing her that she was being placed on probation for 90 days for the following violations: loitering on the second floor of the trimmer building, thereby interrupting or distracting railroad employees; transporting railroad employees in an inefficient manner by using two vans instead of one; crying while driving, driving while fatigued, engaging in emotional conversations, distracting railroad employees riding in her van, and having conflicts with railroad employees and/or other drivers; unprofessional and demeaning conduct toward fellow drivers and “others”; use of radio channels for personal and/or unauthorized reasons; attempting to help railroad employees do their jobs, such as counting railroad cars; and conversing with competitors, railroad employees and others “in a manner detrimental” to the Respondent.¹⁸ However, with the exception of taped conversations over the radio involving Bowles, the issues described in the letter were based on rumor. Furthermore, Richard Black never spoke with Bowles about the issues mentioned in the letter before placing her on probation.¹⁹

C. *The Alleged Discriminatory Treatment of Candice Bowles*

On January 22, Glenda Black, at Richard Black’s request, went to the Galesburg Yard to ascertain whether any of the Respondent’s vans had fliers critical of the Respondent for filing for reorganization under Chapter 11 of the Bankruptcy Act. Both were particularly concerned that Bowles was distributing such fliers. Glenda Black was driven to see Bowles by Terry Peters, another driver. Bowles had just finished eating lunch and was sitting in her van when Glenda Black got into the passenger seat. Bowles had two small grocery type bags on the seat next to her. One bag contained an empty lunch container, eating utensils and an empty soda can. The other bag contained small quilt pieces. Scissors, with the pointed end facing down, were visible from the open glove compartment. After an initial statement about an upcoming employee meeting, Glenda Black asked Bowles whether anyone from the railroad ever told her that she could not do quilting while on duty. However, she did not mention the scissors. Bowles responded that railroad employees had seen her quilting and no one ever told her that she could not do that during downtime.²⁰ Glenda Black then told Bowles that someone was distributing fliers critical of the Respondent and proceeded to examine the documents on Bowles’ clipboard. She noticed a sheet containing a reference to “old heads” and asked Bowles what that meant. Bowles explained that the expression referred to railroad employees who signed her quilt pieces.

¹⁸ GC Exh. 24.

¹⁹ Richard Black testified that, since the satisfaction of the railroad is of “paramount importance,” he usually relied on rumor in suspending employees. Tr. 220–223.

²⁰ Glenda Black testified that she told Bowles on January 22 that she was going to file a report about the presence of the crafts and scissors in the van. Tr. 152–154, 170. I do not credit that testimony for two reasons. First, Glenda Black did not file a report that day, nor did she ever file a report about her observations on that day. Second, it was inconsistent with prior testimony in which she conceded knowing that Bowles had quilted the entire time she worked for the Respondent. Tr. 160–164.

¹⁵ Bowles’ specific recollection of the conference was not refuted by Richard Black or Glenda Black. GC Exhs. 4–9; Tr. 62–63.

¹⁶ GC Exhs. 10–13.

¹⁷ GC Exhs. 14–19.

On January 23, Richard Black directed Glenda Black to go back to the Galesburg Yard and have Bowles relieved. Glenda Black went back to the Galesburg Yard, told Bowles that Peters was relieving her due to "safety issues," and had Bowles take her personal items out of the van.²¹ Bowles asked her what the safety issue was and Glenda Black, for the first time, informed her that there was a problem with having scissors in the van. However, Bowles did not have scissors and crafts in the van on January 23.²² Glenda Black also told Bowles that she was to call Richard Black before she could return to work. Later that day, Glenda Black faxed a report to Richard Black concerning the events of that day.²³

Pursuant to Glenda Black's instructions, Bowles called Richard Black on January 24. Richard Black tape-recorded the conversation. Bowles acknowledged being placed on probation for 90 days and explained her list with names on it. Richard Black explained that he previously removed the first aid kits from the vans because they contained scissors and had discussed that at employee meetings. He then discussed Bowles going into the trimmer building the day before, which she denied. Richard Black then told Bowles that doing crafts in the van was prohibited. Bowles did not argue with him about that, nor did she refuse to follow any instruction by Richard Black that she was not to quilt or have scissors in the van.²⁴ During

the conversation, Richard Black read from Glenda Black's report. However, her report referred to the events of January 23. She generated no written report of the events of January 22.²⁵

Richard Black terminated Bowles based upon Glenda Black's observations on January 22 that Bowles was quilting, and had scissors and bags in the van. Prior to speaking with Glenda Black that day, Richard Black had not received any complaints from anyone, including railroad employees, about Bowles having scissors or bags in the van.²⁶ In a May 7 letter to the Board, Richard Black further explained that he made the decision to terminate Bowles on January 23 because she had unsafe items, including scissors, stored in the van. He also stated that he knew "of no activities that Candice Bowles had participated in except that she in my opinion was likely in favor of the union as she stated she was terminated for her union activities."²⁷ There was no indication in the letter that he discharged her because she refused to recognize his admonition regarding the scissors in his discussion with her on January 24.²⁸

III. DISCUSSION

A. *The 8(a)(3) and (1) Violations*

The General Counsel asserts that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Bowles because she supported and assisted the Union, and engaged in concerted activities. The Respondent contends that Bowles was terminated for cause after she was discovered in violation of a basic safety procedure, during a time "when she was already on probation, and then refused to appropriately respond during a telephone meeting over the incidents."

Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel has the initial burden of establishing that the employee engaged in concerted protected activity, the employer had knowledge of the employee's protected activities, the employer took adverse action against the employee, and there is a connection between the protected concerted activities and the adverse action. Once these elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory reason.

²¹ Richard Black testified that he directed Glenda Black to inspect Bowles' van on January 23 to see if the crafts and scissors were still there and, later that morning, Glenda Black reported that the materials were still in the van. He further asserted that he decided at that point to relieve Bowles, but had not yet determined to terminate her. Tr. 209–210. To the contrary, and consistent with Glenda Black's December 9, 2003 affidavit, I find that Glenda Black did not conduct an inspection on that day and that Richard Black sent her to the Galesburg Yard on January 23 for the sole purpose of having Bowles relieved. R. Exh. 6.

²² Glenda Black and Peters testified that Bowles still had scissors and crafts, as well as large needles, in the van on January 23. Tr. 156–157, 184–186. Peters further testified that the knitting needles were 7 or 8 inches to a foot long. Tr. 189–190. However, the credible evidence indicates that the materials were not in the van that day. Bowles knew, based on prior experience, that Richard Black was likely to take disciplinary action based on Glenda Black's comment about the quilting on January 22. Tr. 255. Furthermore, Bowles explained that knitting needles range from 6 to 18 inches in length, while needles used for quilting measure one to 1 to 1-1/2 inches long. Tr. 250, 256.

²³ Glenda Black originally testified that after she left Bowles on January 22, she immediately wrote down what she had seen in Bowles' van and faxed a copy to Richard Black. She also spoke to Richard Black on her cellular telephone that day. Tr. 154–155, 161. However, in an affidavit, sworn to on December 9, 2003, submitted posthearing at my request, and hereby received in evidence as R. Exh. 6, Glenda Black conceded that her report of January 23, 2002 was the only written report submitted to Richard Black on either day. R. Exh. 6.

²⁴ Richard Black testified that he explained to Bowles the safety concern relating to scissors and the need to secure everything in the van, including the first aid kit, radio, and fire extinguisher. He further testified that Bowles indicated that she would not follow his orders and "the decision to terminate her was because she would not recognize that she shouldn't have bags in the van and she shouldn't have scissors in the van. She could not recognize that that was . . . that they should not be there." Tr. 211–212, 219. However, there was no indication on the recording that Bowles disagreed with him about any of those issues. R. Exh. 5.

²⁵ Glenda Black testified on December 3, 2003 that she faxed a report to Richard Black on January 22. Tr. 237. However, in an affidavit sworn to on December 9, 2003 and received in evidence as R. Exh. 6, Glenda Black conceded that the report annexed to the affidavit was the only one faxed to Richard Black on either day. That report referred only to Glenda Black's interaction with Bowles on January 23.

²⁶ Richard Black conceded this point on direct examination. Tr. 38.

²⁷ ALJ Exh. 1; Tr. 226–229.

²⁸ Richard Black shifted his position during trial and asserted that he decided to terminate Bowles on January 24, 2002 after she failed to recognize the safety problems posed by having scissors in the van. However, that position was not credible, since the recording did not support his version of the conversation on that date, and it was inconsistent with his prior oral testimony and affidavit that he decided to terminate her on January 23, 2002.

The facts establish the existence of all of the factors of a *Wright Line* analysis. First, Bowles had been engaged in an extended amount of concerted activity for over 3 years prior to her discharge. She signed a union-authorization card, distributed fliers promoting the Union on the Respondent's premises, testified on behalf of the Union at two Board hearings, and was the only driver to attend the ballot count for the union-representation election on February 26, 1999.

Second, the Respondent knew that Bowles was actively involved in union-related activity. Glenda Black, an admitted supervisor, was present at two union meetings attended by Bowles, and wrote a report to Richard Black in August 2001, informing him that Bowles was passing out fliers publicizing union meetings and intended to become a union representative. Moreover, Bowles testified against the Respondent in several Board proceedings and attended the counting of ballots during the representation election.

Third, there is overwhelming evidence that the adverse action against Bowles, her termination, was due to antiunion animus on the part of the Respondent. In *Black's Railroad Transit Service*, supra, the Board found that the Respondent, following the Union's successful organizing campaign, suspended Bowles in August 2000, reassigned her in September 2000, and terminated another driver in October 2000, all in violation of Sections 8(a)(3) and (1) of the Act. Based on the similarities between the two cases, the Board's decision in the prior case is evidence of the Respondent's continuing antiunion animus in the current case involving Bowles' discharge. See *Opelika Welding*, 305 NLRB 561, 566 (1991). Furthermore, Richard Black made two significant statements revealing his hostility toward Bowles for her role in the union campaign. In a June 1, 2000 settlement conference with the Board's Regional Director, Richard Black charged that, "if it wasn't for Candy, we wouldn't be here." In his November 6, 2000 affidavit to the Board, he asserted that Bowles was causing unrest among the drivers and was dangerous in a group setting.

Lastly, the evidence strongly suggests a clear connection between Bowles' advocacy for the Union and her termination. The Union had disclaimed interest in representing the drivers in October 2001. However, at the time of Bowles' termination, *Black's Railroad Transit Service*, supra, was pending enforcement before the Court of Appeals. In that case, the Board awarded backpay to Bowles and ordered her reassigned to her former shift and work location. The Respondent evidently sought to counteract the effect of that by placing Bowles on probation for an assortment of frivolous reasons—all based on rumor. Richard Black reinforced that conclusion with his shifting testimony as to the reason why Bowles was fired. He asserted in a May 7 letter to the Board that Bowles was terminated on January 23 because she was quilting while on duty and had scissors stored in the van. However, during his initial hearing testimony, Richard Black clarified that his decision to terminate Bowles was based upon Glenda Black's observations on January 22. He changed his testimony, yet again, and asserted that he made the decision to terminate Bowles on January 24 after she failed to "recognize" that she should not have either scissors or bags in the van.

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have discharged Bowles even in the absence of her union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enf'd. 942 F.2d 1140 (7th Cir. 1991).

Drivers had a significant amount of downtime and, aside from a requirement that they keep their vans clean, had plenty of time to engage in an assortment of activities while they waited for the next pickup. Bowles consistently engaged in quilting during her downtime. However, neither Richard Black nor Glenda Black, as the Respondent's supervisors, ever warned or disciplined an employee based on how they spent their downtime. Interestingly, Bowles was placed on probation for frivolous reasons in December 2001, but neither her quilting nor her use of downtime in general were mentioned among the reasons listed for that adverse action. Furthermore, even though Glenda Black was well acquainted with Bowles' penchant for quilting, including the use and storing of 4-inch scissors, a small needle and craft materials on the van, she expressed nothing but praise for the quality of Bowles' quilting. No railroad employees ever complained about Bowles' quilting and the credible evidence indicated that Bowles kept the scissors in a closed glove compartment while she operated the van.

Based on the foregoing, I find that the Respondent failed to meet its burden of proving that Bowles would have been terminated even in the absence of her activities on behalf of the Union. The reasons asserted by the Respondent were not relied upon and were a pretext for its real reason—punishing Bowles for persistently engaging in protected concerted activity.

B. The 8(a)(4) and (1) Violations

The General Counsel further alleges that the Respondent terminated Bowles on January 23 in violation of Section 8(a)(4) because she filed unfair labor practice charges with the Board and participated in Board investigations and proceedings. The Respondent also denies this charge on the basis of Bowles' alleged misconduct in quilting and storing scissors in the van, and her recalcitrance when confronted by Richard Black about the prohibition against storing scissors and other crafting material in the van.

Section 8(a)(4) makes it unlawful to discharge or otherwise discriminate against an employee because she has filed charges or given testimony at a Board proceeding. A *Wright Line* analysis is also applicable in 8(a)(4) cases. *American Gardens Management Co.*, 338 NLRB No. 76 (2002). As previously discussed, Bowles' involvement with Board proceedings was extensive and the Respondent was well aware of her efforts. She testified at a union representation hearing in October 1998 and April 1999. In August 1999, she filed a charge with the Board—and had another brought by the Union on her behalf—for discrimination in cutting her wages, reassigning her, and changing her work schedule due to her union activities. That charge resulted in the issuance of a complaint in November 1999. It settled in June 2000. In March 2000, Bowles filed a charge with the Board alleging harassment by the Respondent.

The Board declined to prosecute that charge. Bowles, claiming continuing harassment by the Respondent, refiled that charge in September 2000, but withdrew it in October 2000. However, she had filed another charge in September 2000 due to the imposition of a 7-day suspension for engaging in union activity. In November 2000, Bowles amended that charge to assert an unlawful reassignment and a complaint issued. The Respondent defaulted on that complaint and, on June 20, 2001, a Decision and Order issued finding it in violation of Section 8(a)(3) and (1).

There is no mystery as to the Respondent's motivation with respect to Bowles. The prior finding of antiunion animus in *Black's Railroad Transit Service*, supra, as well as Richard Black's implied threat at the June 1, 2000 settlement conference and in his November 6, 2000 affidavit to the Board, constitute overwhelming evidence that he was extremely bitter that Bowles sought assistance from, and cooperated with, the Board. Furthermore, the credible evidence establishes a clear connection between Bowles' cooperation with Board proceedings and her discharge. At a time when the Board's Order regarding Bowles' unlawful suspension and reassignment in 2000 was pending enforcement before the Court of Appeals, Richard Black dispatched Glenda Black to the Galesburg Yard on January 22 for the purpose of uncovering some evidence to justify Bowles' discharge. Finally, for reasons discussed above in connection with the Section 8(a)(3) violation, the Respondent has failed to sustain its burden to show that it would have discharged Bowles even if she had not cooperated in Board proceedings.

CONCLUSIONS OF LAW

1. Black's Railroad Transit Service, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters, Chauffeurs & Helpers, Local Union No. 627, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Bowles due to her support for the Union and cooperation with Board proceedings, the Respondent violated Section 8(a)(4), (3), and (1).
4. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that the Respondent cease and desist from such actions and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notices. It is recommended that the Respondent offer immediate reinstatement to employee Candice L. Bowles, who was unlawfully discharged. She shall be reinstated to her prior position or to a substantially equivalent one if her prior position no longer exists. She shall be made whole for all loss of backpay and benefits sustained by her as a result of the Respondent's unfair labor practices. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as

computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, Black's Railroad Transit Service, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging, or otherwise discriminating against any employee for cooperating with an investigation by the National Labor Relations Board.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative actions necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer employee Candice L. Bowles full reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.
 - (b) Make Candice L. Bowles whole for any loss of earnings and other benefits suffered as the result of her unlawful discharge, in the manner set forth in the remedy section of this decision.
 - (c) Within 14 days from the date of this Order, remove from the personnel files of Candice L. Bowles all references to her unlawful discharge and, within 3 days thereafter, notify her in writing that this has been done and that these unlawful actions will not be used against her in any way.
 - (d) Preserve and, within 14 days of a request, make available to the Board, or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
 - (e) Within 14 days and after service by the Region, post copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 24, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 30, 2004

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters, Chauffeurs & Helpers, Local Union No. 627, International Brotherhood of Teamsters, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Candice L. Bowles full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Candice L. Bowles whole for any loss of earnings and other benefits resulting from the unlawful discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Candice L. Bowles, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that such unlawful disciplinary action will not be used against her in any way.

BLACK'S RAILROAD TRANSIT SERVICE, INC.